United States Court of Appeals

for the Second Circuit

APPENDIX

76-6017

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-6017

UNITED STATES OF AMERICA,

Plaintiff,

- against -

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

FELIX KAUFMAN,

Appellant,

- against -

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

On Appeal from the United States District Court for the Southern District of New York

---

APPENDIX TO THE BRIEFS

HUGHES HUBBARD & REED
Attorneys for Appellant Felix Kaufman
One Wall Street, New York, New York 10005

UNITED STATES DEPARTMENT OF JUSTICE
Attorneys for Plaintiff-Appellee
United States of America
Washington, D.C. 20530

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

Date	Proceedings
1/27/75	Filed Affidavit of Francis F Randolph Jr for an order allowing the reinstatement of two witnesses & the addition of a third witness to its trial witness list.
2/10/75	Filed Memo endorsement on motion dated 1/21/75 # 2124. Motion granted Dr Felix Kaufman & Mr Frederic G. Withington are reinstated to plaintiff's witness sheet. Mr Arthur Beard is added to the government's witness sheet. So ordered Edelstein Ch J (mailed notice).
9/5/75	Filed Affidavits and Notice of Motion by Hughes Hubbard & Reed Attys for Felix Kaufman, and Coopers & Lybrand for an order purs to Rule 45 of the FRCP quashing and vacating the subpoena dated 2-18-75, directing Felix Kaufman to testify, etc, as indicated rtble before Edelstein J on 9-16-75.
9/5/74	Filed Aff'd of Service by Hughes Hubbard & Reed.
9/5/75	Filed memorandum of law in support of motion to quash & vacate subpoena by HH&R.
9/9/75	Filed Memorandum in opposition to motion to quash & vacate the subpoena served upon Felix Kaufman.
12/4/75	Filed Opinion # 43476. Frederic G. Withington, a nonparty of this action has moved for an order quashing & vacating a subpoena directing him to appear & testify on behalf of the U.S. motion denied. Edelstein Ch. J. (mailed notice).
12/8/75	Filed Opinion # 43495. Ordered Kaufman motion to quash & vacate subpoena denied. Ch. J. Edelstein (mailed notice).

Date	Proceedings
12/8/75	Filed letter to Mr Pierpoint from Cravath, Swaine & Moore dated 9/10/75 Re: seeking to quash the trial subpoena served on Felix Kaufman of Coopers & Lybrand.
1/19/75	Filed Notice of Appeal by Felix Kaufman from the order entered on 12/8/75 (mailed notice).
1/19/76	Filed Undertaking for Costs on appeal in the amount of $250 by Fireman's Fund National Surety Corp.
2/9/76	Filed Stipulation under Rule 11(f) F.R.A.P. for partial record on appeal.
2/9/76	Filed Notice of Certification of Record to the USCA as to appellant Felix Kaufman.

KAUFMAN AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

- against -

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

69 Civ. 200 (D.N.E.)

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FELIX KAUFMAN, being duly sworn, deposes and says:

1. I am a partner in the firm of Coopers & Lybrand, an accounting firm with its principal offices located at 1251 Avenue of the Americas, New York, New York. In addition to its New York office, in which I work, Coopers & Lybrand has numerous branch offices located throughout the United States.

2. I make this affidavit in support of a motion to quash and vacate a civil subpoena dated February 18, 1975. This subpoena, a copy of which is annexed hereto as Exhibit A, directs me to appear and testify on behalf of the United States of America in an action entitled United States of America v. International Business Machines Corporation, 69 Civ. 200 (D.N.E.) which is now pending in the United States District Court for the Southern District of New York.

3. Since 1960, I have been first Regional Director for the Northeast Region and then National Director of Management Consulting Services for Coopers & Lybrand. In these capacities, I have had overall supervisory responsibility first in the Northeast Region and then throughout the United States for the manage-

ment consulting services performed by Coopers & Lybrand. Prior to 1960, I was Coopers & Lybrand's National Director of Electronic Data Processing and acted primarily as a consultant to clients of my firm in the area of electronic data processing ("EDP"). As an expert with respect to EDP, I am of course generally familiar with IBM. I have, however, never been employed by IBM or had any other dealings with it except as specifically disclosed in this affidavit. Thus, I believe that I do not possess any unique knowledge or special expertise concerning that company, nor am I aware that I have any knowledge of facts upon which the government's suit against IBM depends.

4. It is my understanding that the government wishes me to testify as an expert witness in its case against IBM and has subpoenaed me solely for this reason.

5. On June 5, 1974 I was informed by Coopers & Lybrand's General Counsel, Harris Amhowitz, Esq., that I had been placed on the witness list by the Department of Justice. This action was taken by the government without consulting me and was entirely without my knowledge or consent. Later that day, I received a telephone call from a Mr. Gene Katz who identified himself as an attorney for the Department of Justice and asked me if I would be willing to testify as an expert for the United States in the IBM case. I informed Mr. Katz that I might be willing to testify if the government retained the services of Coopers & Lybrand. After consulting with the legal department and the management of Coopers & Lybrand, I concluded that I did not wish to testify as an expert witness in this litigation and this fact was communicated to the government by Coopers & Lybrand's legal department. I am informed that because of my unwillingness to testify the government agreed to remove my name from its witness list and did in fact do so.

KAUFMAN AFFIDAVIT

6. In December, 1974 the Los Angeles office of Coopers & Lybrand was retained by Kadison, Pfaelzer, Woodward, Quinn & Rossi, a Los Angeles law firm, to perform certain services for it in connection with its defense of IBM in California Computer Products, Inc. v. IBM, a private antitrust action then pending against IBM in the United States District Court for the Northern District of California. While I have not had any direct personal involvement in the work performed by Coopers & Lybrand in that action, I am generally familiar in my supervisory capacity as National Director of Management Consulting Services with the services which Coopers & Lybrand has performed.

7. Subsequently, in March 1975, the New York office of Coopers & Lybrand was retained by Cravath Swaine & Moore, IBM's attorneys in United States of America v. IBM. Since that time, Coopers & Lybrand has been actively participating in the defense of the government action against IBM. Again, I have had no direct personal involvement in this work aside from my supervisory functions.

8. More recently a subsidiary of IBM has been negotiating with Coopers & Lybrand for the provision of certain management consulting services.

9. I do not wish to appear as a witness on behalf of the government. I believe that my appearance as an expert witness for the government would create a conflict of interest with Coopers & Lybrand's duty of loyalty to IBM.

KAUFMAN AFFIDAVIT

10. I also believe that my refusal to testify as the government's witness in this case would not result in any substantial hardship to the government. I believe that there are a number of other persons who possess comparable expertise concerning EDP and that it should not be difficult for the government to retain other experts to testify with respect to EDP.

Felix Kaufman

Sworn to before me this
2d day of September, 1975.

David L. McLean

Notary Public

DAVID L. McLEAN
Notary Public, State of New York
No. 24-4560605
Qualified in Kings County
Certificate filed in New York County
Commission expires March 30, 1977

EXHIBIT TO KAUFMAN AFFIDAVIT

CIVIL S[illegible] DC Form No 1 (Rev 1-51)

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

F.

UNITED STATES OF AMERICA, Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.

CIVIL ACTION FILE NO. 69 CIV 200 [D.N.E.]

To
Felix Kaufman
Coopers & Lybrand
1251 Avenue of the Americas
New York, New York

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of New York at U. S. Court House, Rm. 110 in the city of New York, New York on the 10th day of March, 19 75, at 9:00 o'clock A. M. to testify on behalf of the United States of America in the above entitled action.

February 18, 19 75

Charles R. Esherick
Attorney for Plaintiff
U. S. Department of Justice
Address:
Washington, D. C. 20530
Tel.: (202-739-2592)

RAYMOND F. BURGHARDT
Clerk

By B. EDWARDS
Deputy Clerk

RETURN ON SERVICE

Received this subpoena at [illegible] on [illegible] and on [illegible] at [illegible]

I served it on the within named [illegible] by delivering a copy to h[illegible] and tendering to h[illegible] the fee for one day's attendance and the mileage allowed by law.

Dated _____, 19___

By _____

Service Fees
Travel $_____
Services _____
Total $_____

Subscribed and sworn to before me, a [illegible] this [illegible] day of [illegible], 19___

Note:—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825.

EXHIBIT TO KAUFMAN AFFIDAVIT

Form DJ-146
(Ed. 4-(6-65))

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : Witnesses subpoenaed

DATE: January 7, 1975

FROM : Charles R. Esherick

SUBJECT: U. S. v. IBM

All witnesses for the Government have been subpoenaed for February 18, 1975, which is the first day of trial. You will not be required to appear on that date. Counsel for the Government will be in contact with you before that date to inform you approximately when your appearance will be necessary. Later, the same counsel will call you to give you a more precise timing schedule.

Should you have any questions concerning your appearance as a witness at trial please call Mr. Charles R. Esherick at (Area Code 202-739-2492 or 2592).

The purpose of this notice is to inform you that the Government intends to inconvenience you as little as possible and please be assured that Government Counsel will do their best to that end consistent with their trial schedules and responsibilities to the Court.

DOJ—1973—04

KATZ AFFIDAVIT

ENTERED
9/10/75

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	69 Civ. 200
INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	)	(D.N.E.)

AFFIDAVIT OF EUGENE M. KATZ

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

EUGENE M. KATZ, being duly sworn, deposes and says:

1. I am an attorney in the Antitrust Division, United States Department of Justice, assigned to assist in the prosecution of the above-captioned case. I make this affidavit in opposition to the motion to quash and vacate the subpoena served upon Dr. Felix Kaufman.

2. Dr. Kaufman is a partner in the accounting firm of Coopers & Lybrand, serving as its National Director of Management Consulting Services.

3. By letter of June 3, 1974 (attached hereto) the Government informed the Court and IBM that Coopers & Lybrand, along with other management consulting firms, would be called as witnesses by the Government. The week prior to this letter I had discussed by telephone with a

Mr. Woodson of Coopers & Lybrand's Washington office the possibility of someone from Coopers & Lybrand providing expert testimony in this case on the data processing industry. Mr. Woodson told me that Coopers & Lybrand might be interested in providing such testimony, and that he was willing to discuss the matter further.

4. On the morning of June 5, 1974, I met with Martin D. McLauchlan of Coopers & Lybrand at its offices in Washington. Mr. McLauchlan informed me that Dr. Kaufman was probably the member of Coopers & Lybrand best qualified to serve as an expert witness. This was the first time that Dr. Kaufman's name was made known to the Government. Later that day, I telephoned Dr Kaufman at his office in New York to make arrangements to meet with him and discuss the possibility of his serving as an expert witness. Dr. Kaufman said that he first had to discuss this with his legal department. Subsequently, we arranged to meet on June 17, 1974.

5. On June 17, 1974, I met with Dr. Kaufman at his office in New York. At this time Dr. Kaufman told me that he was willing to testify at trial. A few days later I received a call from a member of Coopers & Lybrand's legal department who asked me in what manner and in what amount the Government proposed to compensate Dr. Kaufman for his services. I stated that I would seek that information from our administrative office. Shortly thereafter I received another telephone call from a member of Coopers & Lybrand's legal department, who informed me that Coopers

KATZ AFFIDAVIT

& Lybrand's management had decided that Dr. Kaufman could not "spare the time" to serve as a witness, and that they would not allow him to do so. I responded that I was not sure we could compel an expert witness to testify but that I would look into that matter. Some time thereafter Dr. Kaufman's name was removed from the Government's witness list.

6. In January 1975, the Government informed Coopers & Lybrand that Dr. Kaufman would be called as an expert witness at trial. This decision was made after a re-assessment of the foregoing events in light of the importance of Dr. Kaufman's testimony to a full exposition of the facts in this case.

7. On January 20, 1975, the Government moved this Court for an order allowing the reinstatement of Dr. Kaufman to the witness list. The motion was granted.

8. The Government intends to call Dr. Kaufman as an expert witness to present testimony generally relating to his observations and prior opinions expressed during the period from 1960 through 1972. The Government intends to develop testimony from Dr. Kaufman concerning the nature and structure of the general purpose electronic digital computer systems market, and of the electronic data processing industry in general.

9. The Government does not seek to have Dr. Kaufman or his firm conduct any examinations or experiments, nor to undertake any special studies, to prepare himself for trial.

EUGENE M. KATZ

Subscribed and sworn to before me this 10th day of September 1975

NOTARY PUBLIC

My commission expires:

STEPHEN H. LaCOUNT
NOTARY PUBLIC, State of New York
No. 31-4503527
Qualified in New York County
Cert. Filed in New York County
Commission Expires March 30, 1977

ATTACHMENT TO KATZ AFFIDAVIT

9

June 3, 1974

Honorable David N. Edelstein
Chief Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: U. S. v. TRW

Dear Judge Edelstein:

Attached hereto is a list of the remaining witnesses plaintiff presently intends to call as part of its affirmative case at trial.

The following witnesses should be deleted from the witness list previously furnished by the plaintiff:

Herbert Bennington
Wayne Shelton
D. W. Merritt
Donald G. Wharton

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

By: Joseph H. Widmar, Attorney
Department of Justice

Attachment

cc: David Boies, Esquire

ATTACHMENT TO KATZ AFFIDAVIT

Plaintiff's Supplemental Witness List

Dr. Alan J. Perlis
Yale University

Professor Phillip Morse
MIT

R. D. Schmidt
Control Data Corp.

Edward Fegenbaum
Stanford Univeristy

Bernard Goldstein
United Data Centers, Inc.

Fred Weirich
Columbia Gas & Electric

Werner L. Frank
Informatics

Thomas M. Nies
CINCOM Systems, Inc.

Walter E. Muir
CINCOM Systems, Inc.

James D. Tupac
PRC Computer Center, Inc.

Robert L. Brueck
MRI Systems, Corp.

James Conole
Alanthus Corp.

Robert Lloyd
Advanced Memory Systems

Richard C. Andreini
Advanced Memory Systems

Darrel McCollough
Computer Products, Inc.

Al Shugart
Shugart & Associates

Richard Eagan
Cambridge Memories, Inc.

James M. MacGuire
Storage Technology Corp.

Zoltan L. Harper
Storage Technology Corp.

Harold O'Kelly
Datapoint Corp.

G. Harry Ashbridge
Control Data Corp.

Edward R. Grant
LaSalle National Bank

Stephen Jarras
Telex

Jack James
Telex

Lawrence Spitters
Palo Alto, Cal.

Marcus Ponton

ATTACHMENT TO KATZ AFFIDAVIT

James Cozy
Control Data Corp.

Gordon S. Marshall

Al Wyght
Sanders Associates

Robert Deardorff
EM & M

Trude C. Taylor
EM & M

Ryall Poppa
Pertec

Norman M. Laurie

Peter Dipasquale
Sperry Univac

Glenn Schwartz
Sperry Univac

L. D. Huslin
Sperry Univac

Ray Meyer
Control Data Corp.

Lee T. Snapko
Control Data Corp.

Gerald I. Williams
Control Data Corp.

David J. Ackerman
ICL

Thomas McNamara
Honeywell

Richard J. Mindlin
National Cash Register

Delbert Shoemaker
GSA

Marvin Bass
Sperry Univac

Winston Hindle
Digital Equipment Corp.

Frederic G. Withington
Arthur D. Little, Inc.

F. M. Scherer
University of Michigan

Lee Preston
State Univ. of New York

Mirek Stevenson
Quantum Science Corp.

Phil Friend
Quantum Science Corp.

Lloyd C. Hubbard
Control Data Corp.

John R. Morris
Control Data Corp.

Coopers & Lybrand
Washington, D. C.

Arthur Andersen & Co.
Washington, D. C.

Touche Ross & Co.
Washington, D. C.

E. R. Peirce
Burroughs Corp.

Robert Weaver
RCA Corp.

Paul Smith
RCA Corp.

ATTACHMENT TO KATZ AFFIDAVIT

William H. Finigan
National Cash Register

Stephen F. Keating
Honeywell

Arnold Kroll
Unterberg Towbin & Co.

Paul Wythes
Sutter Hill

Richard Stedman
J. H. Whitney Co.

Don Ackerman
J. H. Whitney Co.

Ted Walkowitz
National Aviation

Dave Dunne
IDANTA

Bernie McKenna
Ford Motor Credit

John Margos
Decimas

Mr. Kuhane
Computer Systems of America

Bernie Mahoney
CIS

Mr. Duvineu
General Electric Credit

Robert Novak
General Electric Credit

Paul J. Sternberg
The Singer Co.

Mr. Schiavoni
A. G. Becker

Bob Barber
CIT

Jack Benscotter
Systems Capital

Al Rice
Bank of America

Marty Silberman
North America Corp. of N.Y.

Jim Woodward
First Boston Corp.

Mr. Nevitt
First National Bank of Chicago

Dick Daniel
Security Pacific

Brooks Walker
U. S. Leasing

Walker Ackman
Paine Weber

Jessie Awedia
Storage Technology

Russ Robelan
Coronado Cal.

Hillary New
IBM

John Kelsch
Xerox Corp.

Allan D. Pflugshaupt
Control Data Corp.

ATTACHMENT TO KATZ AFFIDAVIT

George B. Beitzel
IBM

Robert W. Hubner
IBM

G. F. Kennard
IBM

T. Vincent Learson
IBM

T. C. Papes
IBM

J. P. Maurer
IBM

Frank Cary
IBM

Dr. William Miller
IBM

M. L. Fenner
IBM

J. M. Barker
IBM

D. Van Alderwerelt
IBM

A. A. Wilson
IBM

W. D. Winger
IBM

Morton Zeman
IBM

Ulric Weil
IBM

Gilbert E. Jones
IBM

Paul Knaplund
IBM

P. J. Laveau
IBM

John R. Opel
IBM

F. P. Brooks
IBM

Walsh O'Keefe
IBM

J. F. Hicks
IBM

Harper Woodward
Venrock Associates

Peter Crisp
Venrock Associates

Paul Bancroft
Bessimer Corp.

Denis Rep
Allstate Insurance

Bill Hambrecht
Hambrecht & Quist

George Quist
Hambrecht & Quist

Ned Heizer
Heizer Corp.

James J. Ritter
Hale Bros. Assoc., Inc.

Jerry Fassig
IBM

Paul Vilandre
IBM

ATTACHMENT TO KATZ AFFIDAVIT

In addition to the forgoing list, plaintiff may need to call various individuals from the following companies in order to authenticate documents being produced pursuant to the joint subpoenas served by the plaintiff and defendant:

Burroughs Corporation
Control Data Corporation
Digital Equipment Corporation
General Electric Corporation
Honeywell, Inc.
NCR Corporation
RCA Corporation
The Singer Company
Sperry Rand Corporation
Xerox Corporation

The plaintiff has not listed as its witness any person who has been listed as a witness by IBM, and plaintiff reserves the right to call any such person as a witness in its behalf.

18A

DISTRICT COURT'S OPINION RE WITHINGTON

Memo Decision

C084

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

---------- X

69 Civ. 200 (DNE)

MEMORANDUM

#43476

EDELSTEIN, Chief Judge:

Frederic G. Withington, a nonparty to this antitrust action between the United States and International Business Machines Corporation (hereinafter IBM), has moved this court "for an Order, pursuant to Rule 45 of the Federal Rules of Civil Procedure and Section 2304 of the Civil Practice Law and Rules of the State of New York," [1] quashing and vacating a subpoena directing him to appear and testify on behalf of the United States in the above-captioned proceeding.

Although the motion papers fail to isolate the grounds for the requested order, the three supporting affidavits and the accompanying memorandum of law reveal the essential argument: Mr. Withington claims that he is being summoned to testify not as an individual with first-hand knowledge of the facts of this litigation but rather as an expert witness and that, as an unwilling expert, he may not

be compelled to testify. Mr. Withington asserts that the information which he understands the Justice Department will seek to elicit from him at trial is proprietary and should be protected from involuntary revelation. Additionally, while movant's memorandum of law fails even to mention this assertion, it is argued in the accompanying affidavits that certain unspecified contractual relationships that exist between Mr. Withington's current employer, Arthur D. Little, Inc. (hereinafter ADL) and IBM would create a conflict of interest should Mr. Withington be compelled to testify on behalf of the plaintiff.

The Department of Justice does not dispute that it intends to call Mr. Withington to testify as an expert. It contends, however, that this court has the power to compel Mr. Withington to testify on plaintiff's behalf and that such power should be exercised since "Mr. Withington's knowledge and expertise in the [electronic data processing] industry would provide relevant information on the issues in this action." Memorandum in Opposition to Motion to Quash and Vacate the Subpoena Served upon Frederic G. Withington, at 4. For the reasons set forth below, the court has determined that the instant motion must be denied.

The law to which this court must adhere does not support Mr. Withington's central contention that an unwilling expert may not be compelled to testify. In Carter-Wallace, Inc. v. Otte, 474 F.2d 529 (2d Cir. 1972), cert. denied, 412 U.S. 929 (1973), uncited by movant, the Second Circuit was confronted with the argument that the requirement of unavailability prevented the receipt of the prior testimony of certain expert witnesses notwithstanding the fact that the witnesses lived beyond the reach of the court's subpoena power. It was claimed that the rule that a court's lack of power to compel attendance at trial is sufficient proof of unavailability is inapplicable with respect to expert witnesses whose "opinions could under no circumstances be obtained through court process." 474 F.2d at 536. In disposing of this somewhat curious argument, Judge Friendly, writing for the majority, conclusively answered the question raised by Mr. Withington's motion:

> Carter-Wallace's reliance on the court's alleged lack of power to compel expert testimony is misplaced. The weight of authority holds that, although it is not the usual practice, a court does have the power to subpoena an expert witness and, though it cannot require him to conduct any examinations or experiments to prepare himself for trial, it can require him to state whatever opinions he may have previously formed. Boynton v. R. J. Reynolds Tobacco Co., 36 F.Supp. 593 (D. Mass. 1941); United States v. 284, 392 Square Feet of Floor Space, 203 F.Supp. 75 (E.D.N.Y. 1962) (dictum); see 4 Moore, Federal Practice ¶26.66 [1], at 26-469 (1972); 8 Wigmore [Evidence] §2203(2)(c) [3d ed. 1940].

Id. To this rejection by the Court of Appeals of Mr. Withington's essential argument, it need only be added that an even stronger basis may be said to exist in the case at bar for recognizing the court's power to compel expert testimony than existed in Carter-Wallace. This is not an attempt by a litigant in a private controversy to support its case through

the assistance of an unwilling expert. Instead, here is involved an attempt by the United States to summon a member of the public to testify in a major government antitrust case, a case which, by definition, greatly affects the commonweal. See Pennsylvania Co. for Insurances on Lives and Granting Annuities v. City of Phila., 262 Pa. 439, 105 A. 630 (1918).

Ignoring Carter-Wallace, Mr. Withington cites People ex rel. Kraushaar Bros. & Co. v. Thorpe, 296 NY 223, 72 N.E. 2d 165 (1947) for the proposition that in New York an expert cannot be subpoenaed to testify against his will. It is then asserted that under Rule 43(a) of the Federal Rules of Civil Procedure, Kraushaar should control the disposition of this motion. [2] This court cannot agree. The Second Circuit's opinion in Carter-Wallace, issued twenty-five years after Kraushaar and concerning an appeal from a trial in the Eastern District of New York, erases all doubts that this court, sitting in New York, has the power to compel an expert to testify. Further consideration of Kraushaar and other New York cases relying upon it is, therefore, unnecessary.

During the pendency of this motion, the Federal Rules of Evidence became effective. A careful examination of those rules, however, reveals that they leave unaltered the conclusion, compelled by Carter-Wallace, that this court has the authority to compel Mr. Withington to comply with the subpoena.

It is true that Carter-Wallace did not address an alleged conflict of interest which might result from compelling

an expert witness to testify. However, Mr. Withington's reliance on this argument to thwart plaintiff's subpoena is misplaced. This argument, not even mentioned in the "supporting" memorandum of law, [3] is cast in the affidavits in vague and conclusory terms. Thus Mr. Withington claims that "aside from the normal conflict of interest" which would exist if he was compelled to testify since "IBM has been a client of ADL for many years," such testimony would be a "conflict of interest with respect to [his] obligations to [his] employer" since Mr. Withington has been "advised that ADL, in some capacity, is actually participating in [IBM's defense]." Withington affidavit at 3 (emphasis supplied). To this statement by Mr. Withington, counsel for ADL adds in his affidavit that:

> IBM is presently a client of ADL, and ADL is performing services for IBM under a number of contracts. Therefore, ADL management does not believe it to be proper or appropriate for Mr. Withington to appear as an expert witness on behalf of the Justice Department in this proceeding.

Bradford affidavit at 2 ¶4.

Apart from the overgeneralized and indefinite nature of Mr. Withington's assertions concerning unspecified contracts and undefined relationships, the court is simply not persuaded that Mr. Withington's argument relating to an alleged conflict of interest is a sufficient ground for denying the court access to his testimony, the precise subject-matter of which is not even yet known. Nor, it appears, would Professor Moore accept

such an argument. In a section devoted to pre-trial discovery from adverse party's experts, Professor Moore restates the "general American rule" that an expert may be compelled to testify at the trial on matters of expert opinion. 4 J. Moore, Federal Practice ¶26.66[1] at 26-469 (2d ed. 1975).

All that is being required of Mr. Withington, who, as the above-quoted statements suggest, is not personally involved in IBM's defense, is that he perform his duty to testify, impartially, in a case of national significance. That his employer may have enjoyed certain business relationships with defendant now or in the past should not insulate him from this obligation. Were this court to conclude otherwise, a party to a lawsuit involving highly specialized technology could, by the employment of experts, effectively insulate itself from the highly probative testimony that those experts might provide. Mr. Withington may not be the only qualified expert in the field of computers. Nevertheless, the size, complexity and significance of this case create a need to obtain all the relevant testimony that the parties, through their witnesses, can provide. In recognition of this need, the court has permitted the parties to engage in a vast, perhaps unprecedented, discovery program imposing burdens on hundreds of non-parties. Additionally, scores of individuals will be summoned to testify at the trial, in many cases at a considerable sacrifice of time and expense to the witness and the

company he may represent. That the court has permitted the parties to impose these burdens reflects the court's firm belief that as the public will benefit from a just and expeditious resolution of this case, so must the public share in the burdens that such a resolution involves. This same belief constrains the court to conclude that the burden Mr. Withington is being asked to bear should be upheld. Motion denied.

/s/
David N. Edelstein
Chief Judge

Dated: New York, New York
December 4, 1975

FOOTNOTES

1/ Explaining that Fed. R. Civ. P. 45 "is not absolutely clear with respect to the Court's power to quash a civil subpoena requiring testimony only," Memorandum of Law in Support of Motion to Quash and Vacate Subpoena at 3,n.1, Mr. Withington cites section 2304 of the Civil Practice Law and Rules of the State of New York as support for the procedure he has employed in this motion. As authority for this reference to New York law, movant cites Rule 15 of the Civil Rules for the Southern and Eastern Districts of New York. That local rule provides that:

> Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Rules of Civil Procedure, or of the Rules of the United States District Courts for the Eastern and Southern Districts of New York, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States shall be applied, or in default thereof, in the discretion of the court, the procedure which shall then prevail in the Supreme Court or the Surrogates Court as the case may be of the State of New York may be applied.

This court believes, however, that reliance on the N.Y.C.P.L.R. is unnecessary. Since this court has the inherent power to vacate the subpoena served on Mr. Withington and issued from this court, see 5A J. Moore, Federal Practice ¶45.05[2] at 45-37 (2d ed. 1975), it would seem that a motion to quash the subpoena may be made. In any event, Local Civil Rule 15 expresses a clear preference for reliance on parallels or analogies in the Federal Rules before reference is made to New York procedure. The abundantly clear provisions of Fed. R. Civ. P. 45 with regard to a motion to quash a subpoena duces tecum provide the compelling analogy envisioned by Local Civil Rule 15 and permit the procedure invoked by Mr. Withington without reference to section 2304 of the N.Y.C.P.L.R.

2/ With the adoption of the Federal Rules of Evidence in 1975, subdivisions (b) and (c) of Rule 43 were abrogated and subdivision (a) was substantially amended. The effective date of those amendments occurred during the pendency of this motion. However, in light of this court's determination, as indicated in the text, infra, that the new Rules of Evidence do not alter the conclusion that this court has the power to compel Mr. Withington to testify, the court has not reached the question of whether Rule 43(a) or the new Rules of Evidence, in favor of which Rule 43 was amended, "control" the disposition of this motion.

3 / Although cited for a distinctly different proposition of law than one involving an alleged conflict of interest, Mr. Withington does refer in his memorandum to Boynton v. R.J. Reynolds Tobacco Co., 36 F.Supp. 593 (D. Mass. 1941) wherein, after determining that it had the authority to compel an adverse party's expert to submit to a deposition, the court briefly addressed the possibility that the expert would be placed in a conflict of interest. Before relying on the language in that case, however, it must be noted that Boynton, like many of the cases cited by Mr. Withington in his memorandum of law, concerned an attempt to obtain discovery from an opponent's expert. As Professor Moore indicates, such cases are distinguishable from those concerning attempts to subpoena an expert to testify at trial. 4 J. Moore, Federal Practice ¶26.66[1] at 26-470 (2d ed. 1975). In any event, the court in Boynton explicitly indicated that its decision denying the deposition of the expert was simply an exercise of its discretion.

DISTRICT COURT'S OPINION RE KAUFMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

69 Civ. 200 (DNE)

INTERNATIONAL BUSINESS MACHINES CORPORATION,

MEMORANDUM

Defendant.

---------- X

EDELSTEIN, CHIEF JUDGE:

As stated by this court on the record, Tr. at 8516, the within motion is denied. The essential arguments raised by Mr. Kaufman are substantially identical to those raised by one Frederic G. Withington in a motion to quash a subpoena directing him to appear and testify as an expert on behalf of the United States in this case. In a memorandum decision entered on December 4, 1975, the court denied Mr. Withington's motion after addressing the relevant questions and concluding, first, that this court could compel Mr. Withington to testify, as confirmed by the Second Circuit in Carter-Wallace, Inc. v. Otte, 474 F.2d 529, 536 (2d Cir. 1972), cert. denied, 412 U.S. 929 (1973), and, second, that such authority should be exercised in that case. The reasons and principles set forth in the court's memorandum denying Mr. Withington's motion requires the same result with respect to the instant application.

DISTRICT COURT'S OPINION RE KAUFMAN

Mr. Kaufman's assertion that the "showing" required by the Second Circuit in Carter-Wallace as a condition to using prior recorded expert testimony "appl[ies] a fortiori to the expert newly summoned against his will," Memorandum of Law in Support of Motion to Quash and Vacate Subpoena at 9, is so specious as not to warrant extended discussion. It is enough to quote in full the language in Carter-Wallace to which Mr. Kaufman refers and which he partially reproduces in his memorandum. Judge Friendly stated:

> Moreover, even the unavailability of a particular expert witness should not without more allow the use of his prior testimony in a second action. It must be recognized that the general preference of the federal rules, as expressed in F.R.Civ.P. 43(a), is for oral testimony so that there will be an opportunity for live cross-examination and observation of the demeanor of the witness. While the use of previous testimony is a well-established exception to this rule, it is an exception based on the necessity of using the prior testimony when the alternative is loss of that testimony entirely. See 5 Wigmore, supra, § 1402, at 148. When the ordinary witness is unavailable, his unique knowledge of the facts will be lost unless the use of his prior testimony is allowed. But the expert witness generally has no knowledge of the facts of the case. Instead, he is called upon to express a professional opinion upon the facts as they are presented to him, often expressing his opinions in the form of answers to hypothetical questions. Thus, even if one particular expert is unavailable, there is no need to use his previous testimony to prevent the loss of evidence, because there will usually be other experts available to give similar testimony orally. It seems to us, therefore,

> that before the former testimony of an expert witness can be used, there should be some showing not only that the witness is unavailable, but that no other expert of similar qualifications is available or that the unavailable expert has some unique testimony to contribute.

Id. (emphasis supplied). In light of this language, it is clear beyond doubt that the "showing" Judge Friendly required was one prompted by the concerns inherent in the use of prior recorded testimony, concerns which are totally distinct from those involved in compelling an expert to assume the stand where he would be available for direct and cross-examination.

Mr. Kaufman's assertions with regard to the new Federal Rules of Evidence similarly fail to support his attempt to quash plaintiff's subpoena. After stating that "there is no Rule which deals directly with a Party's right to obtain the testimony of experts," Memorandum of Law in Support of Motion to Quash and Vacate Subpoena at 10, Mr. Kaufman refers the court to Rule 706(a) which provides a procedure for the appointment by the court of experts. While it is true, as Mr. Kaufman points out, that that Rule states that "[a]n expert shall not be appointed by the court unless he consents to act," Mr. Kaufman's reliance on that statement is misplaced. First, the "appointment" envisioned by Rule 706(a) contemplates requiring the expert to perform significant duties, such as preparing "findings," in addition to or in lieu of testifying at the trial. Since the court in Carter-Wallace would not permit such additional duties to be imposed on an unwilling

expert, 474 F.2d at 536, the requirement of consent contained in Rule 706(a) is not inconsistent with the ruling by the Second Circuit in Carter-Wallace. Second, as plaintiff's answering memorandum indicates (at 4), Mr. Kaufman fails to acknowledge subdivision (d) of Rule 706 which at least suggests that the requirement of consent in subdivision (a) does not extend to a party's attempt to subpoena an unwilling expert. Subdivision (d) provides:

> Parties' experts of own selection. Nothing in this rule [706] limits the parties in calling expert witnesses of their own selection.

Like Mr. Withington, Mr. Kaufman asserts that compelling him to testify for the United States would create a conflict of interest since his employer, Coopers & Lybrand, is performing certain unspecified services for IBM. In the preliminary statement to his memorandum of law, Mr. Kaufman explains that in September of 1974 Coopers & Lybrand agreed to perform services in preparation of IBM's defense in a separate private action, California Computer Products, Inc. v. IBM, Civil Action No. 73-2331 (N.D. Cal.) and that, thereafter, Coopers & Lybrand was engaged by Cravath, Swaine & Moore, IBM's counsel in this case, "to perform certain services in connection with the preparation of IBM's defense in the present action." Kaufman affidavit, at 3. Further, it is asserted that Coopers & Lybrand "has been negotiating with IBM about a possible engagement to perform certain consulting services on behalf of an IBM subsidiary in a matter unrelated to this action." Id. (emphasis supplied).

DISTRICT COURT'S OPINION RE KAUFMAN

In evaluating Mr. Kaufman's claim, the court must consider not only the value of his testimony to this complex and extraordinary case, see infra, but also several influential factors revealed by the papers submitted on this motion. First, apart from a general familiarity due to his supervisory capacity as National Director of Management Consulting Services, Mr. Kaufman concedes that he has "no direct personal involvement" in the work performed by Coopers & Lybrand for IBM in its defense in this or the California case. Kaufman affidavit, at 3. Moreover, and of particular significance, IBM and its counsel, to whom Mr. Kaufman asserts the "duty of loyalty" is owed, have indicated both to Mr. Kaufman and to this court that they do not "wish to assert [in their] behalf that Mr. Kaufman is in any way precluded from testifying on behalf of the Government because of the relationship with IBM and its counsel which Coopers & Lybrand has undertaken." Letter from Thomas D. Barr (counsel for IBM) to Powell Pierpoint (counsel for Kaufman), dated September 17, 1975 (filed December 8, 1975). Indeed, as IBM points out in that letter, a copy of which is annexed hereto, in response to plaintiff's motion to add Mr. Kaufman's name to its witness list defendant filed an affidavit consenting to the entry of such an order.

In addition to these factors, Mr. Kaufman's allegations as to a conflict of interest must be weighed against two representations contained in plaintiff's answering memorandum of law. First, plaintiff asserts that Mr. Kaufman will be called to testify "concerning his observations and prior opinions

expressed during the period 1960 through 1972." Memorandum in Opposition to Motion to Quash and Vacate the Subpoena Served upon Felix Kaufman, at 5. This time frame, of course, terminates before Mr. Kaufman's employer undertook for IBM whatever services are referred to in the Kaufman affidavit. Additionally, plaintiff asks the court to note that:

> Coopers & Lybrand has in the past performed a significant amount of consulting services for the Department of Justice and other Government agencies . . . . The 'duty of loyalty' expressed by Dr. Kaufman and implied by Mr. Ammowitz in their affidavits did not deter Coopers & Lybrand from being retained by IBM counsel to assist in the defense of this case in spite of its past relationships with the Government, and one month after Dr. Kaufman was subpoenaed to appear as a Government witness. This 'duty of loyalty' cannot and should not preclude Dr. Kaufman's testimony concerning prior opinions formed as an impartial observer of the data processing industry.

Id. at 5-6.

In light of these factors, the court cannot accept Mr. Kaufman's allegations with regard to an alleged conflict of interest -- a "conflict" that does not even appear to concern IBM.

Having considered Mr. Kaufman's arguments in the context of this exceptional case, the court has determined in the exercise of its discretion that Mr. Kaufman should obey plaintiff's subpoena. A self-described "expert with respect to EDP," Kaufman affidavit, at 2, Mr. Kaufman was, prior to 1960, Cooper & Lybrand's National Director of EDP, acting primarily as a consultant in the area of EDP. Since that time

he has been Regional and then National Director of Management Consulting Services. Accordingly, his testimony, like that of Mr. Withington; [1] has promise to be highly productive and of assistance to the court in the trial of this case.

David N. Edelstein
Chief Judge

Dated: New York, N. Y.
December 8, 1975

1/ Mr. Withington, an employee of Arthur D. Little, Inc., a well-known consulting firm, described his function as "a management consultant to a wide variety of manufacturers, sellers and users of electronic computers . . . .". Withington Affidavit at 1-2.

ATTACHMENT TO DISTRICT COURT'S
OPINION RE KAUFMAN

CRAVATH, SWAINE & MOORE

ONE CHASE MANHATTAN PLAZA

NEW YORK, N.Y. 10005

212 HANOVER 2-3000

INTERNATIONAL TELEX GROUPS
TELETYPE 710-581-0136
TELEX 125547

EDWARD B. PINNEY
L. R. BRESLIN JR.
HAROLD R. MEDINA, JR.
COUNSEL

6, PLACE DE LA CONCORDE
75008 PARIS, FRANCE
TELEPHONE 265-81
TELEX 29-930

TERMINAL HOUSE
52, GROSVENOR GARDENS
LONDON, SW1W 0AU, ENGLAND
TELEPHONE 01-730-0377
TELEX 917851

CABLE ADDRESSES
CRAVATH, N.Y.
CRAVATH, PARIS
CRAVATH, LONDON S.W.1

September 10, 1975

U. S. v. IBM

Dear Mr. Pierpoint:

I have just read your papers dated September 2, 1975, seeking to quash the trial subpoena served on Felix Kaufman of Coopers & Lybrand in the above case. I particularly write because of the references in those papers to a conflict between Coopers & Lybrand's obligations to IBM and Mr. Kaufman's possible testimony in behalf of the Government.

I have been in charge of this case since its inception and throughout much of that time have used Price Waterhouse & Co. as accountants to assist us. In respect of two pending cases--California Computer Products Corporation v. IBM and Sanders Associates, Inc. v. IBM--Price Waterhouse has been unable to act for counsel for IBM because of prior relationships with those two plaintiffs. In each of those cases IBM counsel, first in California and then in Concord, New Hampshire, have retained Coopers & Lybrand. Subsequent to those retainers, my firm retained Coopers & Lybrand, particularly in connection with the possible testimony at trial here of officers of California Computer Products Corporation and Sanders Associates, Inc. I should say that my firm has some general responsibility both for the California Computer and Sanders Associates cases and, of course, constantly consults with counsel for IBM in those cases.

I certainly understand why Coopers & Lybrand and Mr. Kaufman do object to having his services subpoenaed by the plaintiff and believe that your motion on that ground is sound. I also understand why, as a general proposition, Coopers & Lybrand does not wish to be involved on both sides

ATTACHMENT TO DISTRICT COURT'S
OPINION RE KAUFMAN

of any pending litigation or to act inconsistently with the interests of any of its clients.

However, I want you to know that neither we nor IBM wish to assert on our behalf that Mr. Kaufman is in any way precluded from testifying on behalf of the Government because of the relationship with IBM and its counsel which Coopers & Lybrand has undertaken. I should also call to your attention that on January 26, 1975, we filed an affidavit consenting to the entry of an order granting the motion of the plaintiff to add Mr. Kaufman's name to the witness list for the second time. Of course, we did so at that time with the knowledge that Coopers & Lybrand was already working for IBM in the California Computer case and believing that there was no conflict engendered because of that work. In fact I have a vague recollection that I informed plaintiff's counsel at the time that Coopers had accepted an engagement in the California Computer case.

I want to apologize for not having focused upon this matter before today, but I hope you will understand that since the motion was not directed against us, but rather against the plaintiff, it did not immediately reach the top of my reading pile. I recognize, of course, that our position should be brought to the Court's attention promptly and that can be done by memorandum from you or from me or by furnishing the Court a copy of this letter, as you please. Perhaps after you have had a chance to read this letter you might give me a call and we could discuss the best way to do that.

Sincerely,

Tom Barr

Thomas D. Barr

Powell Pierpoint, Esq.,
Messrs. Hughes Hubbard & Reed,
One Wall Street,
New York, N. Y. 10005

X

BY HAND

Robert B. Duke, Jr. (RD)

COPY RECEIVED
March 5-15 1976
UNITED STATES ATTORNEY

1976 MAR -5 PM 3 49